STRAITS SETTLEMENTS REPORTS.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

February 15, 1939

KEE BAN KEAT

v.

CHOP SIONG JOO CHEONG.

[SINGAPORE SUIT No. 322 of 1937]

Agency—principal appointing an attorney who is a partner in the firm of agents—payment by agents to attorney — whether agents liable to account.

The plaintiff brought a suit against the defendants for an account of their receipts and payments as Commission Agents of the plaintiff and for payment of the amount certified by the Registrar to be due. On January 8, 1931 the plaintiff appointed O. S. K. to be his attorney in the management of certain rubber estates at Karimoen, Netherlands East Indies. The attorney was a partner in the defendant firm. He was authorised to collect the produce of the estates, and sell the same through his firm (the defendants) in Singapore, and the defendant firm would receive 2% of the nett profit as their commission. In their defence the defendants, *inter alia*, admitted that O.S.K. acted as agent for the plaintiffs and consigned the plaintiff's rubber to them for sale. They contended that they duly rendered an account of their transactions to O.S.K. and that they were not under obligation to submit further accounts. The Court ordered that an account be taken of the receipts of and payments by the defendants as commission agents of the plaintiff, with liberty to the plaintiff to surcharge and falsify. An enquiry was therefore taken before the Registrar on the accounts as eventually filed. At the enquiry, Counsel for the plaintiff submitted that a settled account as between principal and agent, and his own partnership did not bind the principal. For the defendants it was argued that all money paid to O.S.K. as attorney for the plaintiff was, in fact, paid to the plaintiff. The Registrar, however, held that this was a question of law which should have been, or, in view of the order of the Court for accounts to be taken as between the plaintiff and the defendants, must have been in the mind of the Judge when he made an order for the inquiry. The Registrar found that as between the plaintiff and the defendants, the latter had failed to account to the Plaintiff for a sum of $8,274/–, for the following, among other, reasons. "The reason why I allowed the falsifications to the extent appearing in the draft certificate was that the defendants had failed to account for the amount disallowed. At the Enquiry I appreciated that Seng Kwang had not advised the defendants of any disbursements which might reduce the liability of defendants on the accounts as filed by them—(as the account filed appeared to be complete). And, in fact, I advised him (Seng Kwang) to keep in touch with his firm (defendants) as on the facts appearing to me, he might eventually find himself faced with a personal claim for the whole amount....." Upon application to the Judge to vary the Registrar's Certificate

Held, that payment by the defendant firm to the attorney of the plaintiff, notwithstanding that such attorney was a partner of the defendant firm, operated to discharge the defendants' liability to account to the plaintiff.

SUMMONS TO VARY A CERTIFICATE OF THE REGISTRAR.

The Defendants at all material times carried on business as produce and commission agents in Singapore. Though they do business outside Singapore, their only place of business is, and has been, at all material times, Singapore. One of their partners, Ng Seng Kwang, at all material times resided in the Karimoen Islands, but not for the purpose of the business of the Defendants.

The said Ng Seng Kwang (hereinafter called the "Attorney") was personally authorised by the Plaintiff, by a Power of Attorney made in 1931, to act as the Plaintiff's attorney in connection with the plaintiff's rubber lands in the said Karimoen Islands. The said Power of Attorney authorised the Attorney to send the produce of the Plaintiff's estates to the Defendant firm at Singapore for sale, and laid down that the proceeds of sale were to be remitted by the Defendant firm to the Attorney at the said Karimoen Islands who, after deducting certain commission due to himself and paying expenses incurred on the Plaintiff's behalf, was to refund any balance to the Defendants.

The Attorney acted under the said Power of Attorney and despatched rubber to the Defendants for sale. In accordance with local practice, the Attorney, when he put rubber on boardship for despatch to the Defendant firm, took an advance from the Chinchews of the Ships. The Defendants repaid the Chinchews out of the proceeds and sent the balance due to the Plaintiff by the said Chinchews to the Attorney.

An account being ordered to be taken of the dealings of the defendant firm with the rubber of the Plaintiff, the learned Registrar found as facts that the Defendant firm had paid over the whole proceeds of the Plaintiff's rubber (less the advances made by Chinchews to the Attorney) to the said Chinchews who paid them over to the Attorney, and that in fact a small overpayment was made. There was no suggestion that the Attorney repaid any money to the Defendants. Nevertheless, the Registrar found that these payments by the Defendants to the Attorney did not discharge the Defendant firm.

The Defendants appealed against this finding and against the disallowance of items representing the said payments to the attorney.

Walters (*Richard Lim* with him) for the Defendants (Applicants). The power of attorney is clear. The whole point in this case is whether the fact that the attorney of the Plaintiff to whom the proceeds of sales were paid, has at all material times also been a partner in the Defendant firm, is a material fact.

It was argued before the learned Registrar on behalf of the Plaintiff that the receipt by the Attorney of the proceeds was not a good discharge to the Defendants because "the receipt by

him to his chop is a receipt by himself to himself". This involves the proposition that a partner cannot act or have any authority independently of a firm in which he is a partner, which it is respectfully submitted is plainly wrong. *Chilton* v. *Ccoks* 37 L. T. 607, shews that a power of attorney may confer authority in favour of one member of a firm without conferring any authority on his partners, and in such a case liability is not generally imposed on the firm for the wrongful acts of the partner in the exercise of the power. See also *Halsbury*, 2nd ed., Vol. 1, para. 824. The mere fact that the money has at one time been in the custody of a firm and is subsequently misapplied by a partner when not in the custody of the firm is insufficient to make the firm responsible. See *Lindley*, 10th ed., p.223, which at p.220 lays down:—

> " A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not been connected with the firm he might not have been in a position to commit the fraud."

Tendring Hundred Waterworks Co. v. *Jones* (1903) 2 Ch. 615, is an authority supporting the proposition in the text.

The cases where a firm has been made responsible for losses incurred by the act of a particular partner are cases where the defaulting partner misapplies the money whilst it is in the custody of the firm. See *Lindley*, pp. 214, 215 and 217. If any money has been misapplied in the present case, it was while it was in the custody of the attorney and not of the partners. (They also referred to *Lysaght* v. *Bryant*, 9 C.B. 46 and *Furnivall* v. *Hudson*, 1893, 1 Ch., p. 335). It is submitted that the Defendants have fully accounted to the attorney of the plaintiff's own choice and have shewn that nothing further is due from them or required of them.

Withers-Payne for Plaintiff submitted that payment by a partnership to a partner does not discharge his firm, where the firm has possession of proceeds in the course of business. He submitted that the legal possession of the balance of monies notwithstanding payment to Seng Kwang, remained in the firm who were properly before the Court as Defendants. *Lindley* (*Supra*) 147, 189, 215, 478. *Hailsham*, Volume 24, Article 836. *Jacaud and anor.* v. *French and others*, (1810) 12 East 317. *Sadler* v. *Lee* (1843) 6 *Beaven*, 324, and *E.I.Co.* v. *Mainstone*, 22 E.R. 918. Defendants are agents of the Plaintiff for the sale of rubber and must account to Plaintiff.

Walters in reply: The cases cited for the Plaintiff have no application. The Plaintiff apparently required an account of the dealings in produce from the Defendants, and probably a separate account (which can only properly be asked for in a separate action) against the attorney as to his application of the moneys paid to him as attorney of the plaintiff by the Defendants. Judgment cannot be given in this action except against the whole partnership. It is apparent that the whole firm is not liable for what the attorney did with the money. Annual Practice 1939, p. 877.

[They also referred to English Order 48A Rule 10 and Straits Order 46 Rule 10].

Cur. Ad. Vult.

HORNE, J.—The writ was issued in August 1937. There was an offer of inspection of vouchers made by the defendants, but then no inspection was given. In July 1938 the case came on for trial of an issue as to estoppel. (In May there was a summons for accounts but the result of that was an order to try the issue of estoppel raised by the Defence). The defendants failed on that issue after argument on the pleadings and affidavit filed in the summons for account. No evidence was called by either party. Obviously the plaintiff was entitled to an account from the defendants as his agents for the sale of the rubber, and an account of the transactions from 1st January 1931 to end of 1934 was ordered. The order required an account of receipts and payments by the defendants as commission agents of the plaintiff. A general enquiry has on the basis of that order been held by the Registrar with the consent of the parties, the defendants adducing evidence in support of items falsified by the plaintiff. After hearing this evidence the items were disallowed. After the disallowance and after the certificate, the Power of Attorney is put in evidence. I suppose the Registrar felt that it was impossible for him to go behind his previous decision to disallow the items, so the matter is now again before me on an application to vary the certificate and if that fails on a motion for judgment.

From the evidence before the Registrar and from the documents it now appears that the plaintiff appointed Wee Seng Kwang to be his attorney for the purpose of taking charge of his rubber lands in Karimoen to collect the product, to sell it to Siong Joo Cheong, a partnership in which Seng Kwang was at all material times a partner, to receive the proceeds of sale from the firm, to deduct 20% of the nett profit, and to apply any balance in payment of his debt. At the date of this Power of Attorney there is no new arrangement made between the principal (the plaintiff) and the partnership. The existing account of the plaintiff in the name of Kee Ban Hin Estate was carried on with a debit balance brought forward from 1930 of $425.25. There is no evidence of any communication made by the plaintiff to the firm and the Power of Attorney empowers Seng Kwang to act in the plaintiff's name.

The Power being entered into before and witnessed by a public officer is a formal document and must be construed strictly. Although the document does not expressly state the manner in which the collection of the product, a matter which involves expenditure on labour for tapping, preparation and transport to the ship, is to be financed; I think from the operative words used and the order thereof that it could be construed as meaning that the agent should finance the matter in the first place, and, having collected the product, repay himself the cost of production and delivery to ship, then deduct his 20% of the nett profit, and then, if there is any balance. apply it in reduction of the existing debt of the plaintiff to the firm. But at the end of the document there is the phrase "that the first party (plaintiff) gives Power of Attorney to the second party (Seng Kwang) to act in his name". Therefore for the purposes of the collection and the consignment of the product Seng Kwang the agent or attorney can act as the principal could have acted.

The system of receiving advances from the chinchews must have been known to the plaintiff and looking at the document as a whole, I think, it must be read as empowering Seng Kwang to receive the proceeds by way of advances.

" A third person", such as the firm in this case, "is not discharged by payment to an agent, unless such payment is made in the ordinary course of business and in accordance with the agent's authority, express or implied" (1 *Hailsham* paragraph 468). Clearly, on the construction of the Power the agent had authority to receive the payment.

But even if the Power were to be construed as entitling the agent to receive payment in cash only, and not before it is due, a reasonable custom to receive payment in a particular mode may be proved. (*Id.* paragraph 377). And here too, out of the payment, it is intended that the agent shall pay himself a reward for his service and also pay a debt due to himself and his partners.

Accordingly the practice or usage of receiving advances on the shipments, established by the evidence taken by the Registrar, does not appear to me to be inconsistent with this alternative construction of the Power.

I have dealt at length with this aspect of the matter because it has been submitted that the agent Seng Kwang had no authority to take advance under the Power of Attorney. In my opinion, *Jonmenjoy Coondoo* v. *Watson*, 9 App: Cases 561 and *De Bouchout* v. *Goldsmid*, 5 Vesey, 211, have no application to this case for the agent, even if each shipment is regarded as a pledge, is not pledging the goods for a debt of his own, but is merely accepting, in effect a part payment on account of the proceeds, in order to continue the work of collecting the product of the estate. The plaintiff knew that Seng Kwang was a partner in the defendant firm and if the plaintiff was intending to alter the usual method of business when he gave the Power, he could have made the matter clear in the document then drawn up and could have informed the firm in Singapore of his wishes.

If there were any evidence that the naming of the rubber lands "Chop Po Seng & Ban Ho" meant that the plaintiff had a business as a rubber planter which business had funds in hand to carry on with, I might take another view. But as I have said as I understand the matter the only funds available are the proceeds of the rubber.

In order to support the view taken by the Registrar that the payments in question do not discharge the defendant firm it would be necessary to construe the Power of Attorney so as to make the firm a party to it. Dr. Withers-Payne is compelled to go so far for he submits that the object of the document is to keep the legal possession of the proceeds of the rubber (less the expenses) in the hands of the firm.

Certainly the defendant firm is the agent of the plaintiff for the sale of the consigned rubber, but the firm is not his agent for the production of the rubber and the consignment of it to Singapore. and the firm were his agents for sale before the Power was given to Seng Kwang. The firm's custody of the proceeds ends when those proceeds are transmitted to the plaintiff's agent duly authorized to receive them. There is no evidence that the firm ever authorized Seng Kwang to act on behalf of the firm, as agent for the collection and shipment of the plaintiff's rubber. That agency is as far as the evidence discloses, a personal arrangement between Seng Kwang and the plaintiff. I cannot assume that this arrangement is part of the business of the partnership simply upon the sole fact that Seng Kwang is one of the partners of the firm even to the extent of a 1/3rd share.

The argument is that because the rubber is sold by the firm the firm has custody of the proceeds and in paying them to Seng Kwang, a partner, the proceeds never go out of the firm's custody or, as it is put, its legal possession. The result is that the plaintiff now seeks to make a commission agent 'Chop' liable for management of his estate because one of its partners has taken over the management of that estate. But there is no evidence of acquiescence of the other partners in the act of Seng Kwang nor of ratification by the other partners. The firm apparently has no entries in their books relating to the estate management. There is also no evidence that it is part of their business to act as such managers. They pay the proceeds to Seng Kwang and as far as the partnership is concerned there the matter ends. Certainly Seng Kwang cannot himself

be a creditor of the firm, but no case has been cited to show that, being a partner, he is prevented from being the agent of a creditor of the firm, and as such agent receiving a payment from the firm of which he is a partner and thus discharging the firm. The plaintiff put Seng Kwang into such a position when he gave the Power of Attorney and must remain bound by it.

I hold therefore that the payments in question are a good discharge and vary the Registrar's Certificate in accordance with the terms of the Summons. Costs of the argument on certificate to be defendants in any event.

Registrar's Certificate Varied.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 22, 1939.

IN THE MATTER OF THE ESTATE OF EUSOFF MOHAMED SALLEH ANGULLIA, DECEASED.

AHMAD MOHAMED SALLEH ANGULLIA & 2 OTHERS.....Plaintiffs

vs.

RAHIMABOO BINTE MOHAMED SALLEH ANGULLIA & ANOTHER.....Defendants

[SINGAPORE PROBATE No. 252 of 1938 & Suit No. 408 of 1938]

Probate of Will—Testamentary capacity—Unsoundness of Mind and Undue Influence—Onus of Proof—Costs of probate action.

Where a will is impeached on the ground of unsoundness of mind, the Court must be satisfied on a review of the whole evidence that the testator was of sound mind, memory, and understanding at the time of its execution; but there is a strong presumption in favour of any will which in terms is not unreasonable and shows no sign of mental defeciency. *Estate of Bohrmann* (1938) A.E.R. 271, and *Smith* v. *Tebbitt*, 1 P. & D. 398, considered.

A testator had suffered from attacks of insanity in the past, and had on 4 occasions, namely, in 1910, 1918, 1924 & 1934, been certified as insane and detained in a mental hospital for short periods. He had long lucid intervals between the attacks and on the 4th June 1938 he executed a Will and a codicil giving most of his estate to charity. The will was attested by the testator's solicitor and his doctor, both of whom deposed to the fact that the testator, although physically weak and mentally dull at the time, appeared to be of sound mind, memory and understanding. The testator died on the 7th June 1938 from a diabetic attack.

Held, on the evidence as a whole, that the will and codicil had been made in a lucid interval, and should be pronounced for.

Costs awarded out of the estate to defendants unsuccessfully opposing probate on the ground of unsoundness of mind, where there is a reasonable case for inquiry.

Rule in *Mitchell* v. *Gard*, (1863) 3 Sw. & Tr. 275, applied.

WITNESS ACTION.

On the 27th July 1938 the Plaintiffs filed a Petition for Probate of the Will and Codcil of Eusoof Mohamed Salleh Angullia deceased as the executors named therein. The Petition was opposed by the 1st Defendant who had filed a caveat on the 11th July 1938, and by the 2nd Defendant who filed a caveat on the 2nd September 1938. By an Order dated the 16th September 1938 it was ordered that the matter proceed as an action with pleadings.

The 1st Defendant delivered a defence alleging (a) that the testator was not of sound mind memory and understanding at the time of the execution of the Will and Codicil; and (b) that the execution of the Will and Codicil was procured by the undue influence of the 1st Plaintiff. The 2nd Defendant did not file any defence or take part in the trial.

Koek & Garden for the Plaintiffs.

Burke for the 1st Defendant.

Sammy for the 2nd Defendant, appeared but took no part in the proceedings.

Worley, Solicitor-General, for the Attorney-General who had been cited as representing the charitable interests, also appeared but took no part in the proceedings.

At the conclusion of the evidence the Judge ruled that there was no evidence of undue influence at the time of the execution of the Will and Codicil, and the argument was thereafter confined to the issue of testamentary capacity.

Cur. Ad. Vult.

HORNE, J.—Ahmad M. S. Angullia, his two sons, the Executors, the plaintiffs, propound a will made on the 4th day of June 1938 by Eusoff Mohamed Salleh Angullia (hereinafter referred to as Eusoff) who died on the 7th of June 1938. Eusoff is a younger brother of Ahmad.

The first or active defendant is Rahimaboo the sister of Eusoff and Ahmad. There is a second defendant Rahimaboo, who from 1927 to 27th March 1938 was the wife of the testator. She is a defendant on the record, having entered an appearance but has not formally pleaded.

The defendant Rahimaboo by the substance of the case alleges that the testator was of unsound mind when he made his will; that he had been of unsound mind for many years prior to his death: that he was subject to fits of violence and delusions; that he had been certified as insane and had been under treatment on four occasions, viz: in 1910, in 1918, in 1924 and 1934; that in 1918 and 1934 the diagnosis had been "imbecility"; that in 1910 and 1924 the diagnosis had been "mania"; that he was removed from the mental hospital in 1934 while still insane and had never recovered and continued to have delusions, and that as a result he was incapable of making a will.